

WHAT IS A LEGAL RELATION?

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With the article of Professor Clark, published in the present issue, I am in entire agreement. The reading thereof has caused me to make a new and careful study of Professor Kocourek's article in the last June number of this *QUARTERLY*. It is not necessary here to dwell upon some of our points of disagreement; instead, it is my purpose to point out in his article some indications of mutual agreement and understanding.

On page 237 we find the following: "What is a legal relation? The test which seems to be advanced is that it is every situation which is or may be procedurally asserted for a declaration or denial of right, or for an imposition of a sanction, or any other purpose within the scope of adjudicative action, whether well-founded or not." With the omission of the last four words, this comes reasonably close to my own position. Those four words, however, must be omitted. A "situation" is not "well-founded;" nor is it "ill-founded." It merely *is*. The "situation" consists of the existing facts, already gone into history. A predication or assertion as to how those facts will affect the future conduct of private individuals or of societal agents, or of the wind and waves may be "well-founded" or ill-founded, but the facts themselves are neither. If those facts enable us to predict that Mrs. Grundy's tongue will or will not wag, we say that there is a moral or deportmental "relation." If they determine the future conduct of societal agents, acting by rule on behalf of our organized fellow-men, with respect to specific persons, we say that these persons are in a legal relation. What makes the existing "situation" a *legal* relation is that it determines societal conduct. The problem is what will society do? A rule is a rule or law when it describes what society will do, either presently or conditionally. It is quite immaterial (for present purposes) what that conduct of society will be, whether it will be intentional action or conscious forbearance. We wish to know, and we litigate to find out.

The learned author in his next sentence says: "This is a liberal program which gives enormous breadth to the law." In an earlier article he said that it might cause the law to break down of its own weight. Agreed. But it is the truth. The law does have enormous breadth, and it may break down of its own weight. Civilization may become too complex to endure. It is true that our system of stated rules cannot cover all possible "situations," but it is daily becoming

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more complex and inclusive through the declarations of courts and legislatures. We have the added complicating feature that no declaration is final except as between the two litigating parties. It is daily becoming more difficult to advise a client. No man can know all the law. In spite of this difficulty, it is impossible for us to restrict our "laws" and our "law" books to those rules that assert affirmatively that society will use "constraint." They would be adequate to inform us as to what will be the future societal conduct with respect to our clients only in case they contain a complete catalog of all "situations" where society will actively use constraint. We could in such case know, by process of exclusion, when society would not use constraint. But it is impossible to prepare such a catalog. Millions of "situations" have not yet been passed upon at all, and we do not yet know enough to hazard a prediction or to formulate a rule. Society is going to use constraint in many "situations" not yet covered by our system of stated rules. Therefore, we desire to know, so far as it can yet be shown, what are the "situations" in which society will *not* use constraint. A client brings his "situation" to his lawyer and asks what will society do about it. The lawyer studies history and predicts the future; he replies, society constrains (and you are under a duty); or he replies, society does not constrain (and you have a privilege). In either case, *according to established and desirable usage*, he is laying down the *law* and acting as a lawyer.

The learned author further says: "The present writer does not regard the question of the name to be applied to these non-legal-content situations as important." Agreed, again; except that one terminology may be more usable than another and that some agreement on terminology is necessary for clear expression and correct decision. *A priori*, it would not make a scintilla of difference whether we call certain situations legal or "non-legal." "Our chief quarrel is . . . with the use of terminology which permits one fundamental term to be used for three distinct and separable ideas." It is a great satisfaction to be quarreling on the same side and for the purpose of attaining the same end. That is exactly why Hohfeld tried to limit the fundamental term, "privilege," to mean only that society does not constrain a specific person to conduct himself toward another in a specified way. He did not use it in the threefold sense of "(1) Liberty; (2) Privilege; and (3) Power;" either as those three terms are defined by others or as he defined them himself. We do not maintain either that his usage is the *necessary* usage or that others do not use the term in a threefold sense.

A legal relation is not a *thing*; nor does it have "content," except in the most figurative sense (and in legal discussion figures of speech may be very inaccurate and misleading). Every human being finds himself amidst ever-changing combinations of facts. These

combinations affect the conduct of other human beings. Experience has shown that they affect this conduct with more or less uniformity, and hence in accordance with more or less well-defined rules. Conduct can, therefore, be predicted with some degree of accuracy by men of judgment and experience. Men group themselves together by the million and become known as a society or the state. They choose agents and officers to act in certain matters for them as such society or state. In other matters they react only as individuals, and not as a society through appointed agents. A person needs to know both how this combination of facts will affect the conduct of societal agents and how it will affect the conduct of private individuals. As to the first, he is in the field of what we call legal relation; as to the second, he is in the field of morality, fashion, or whatnot. He may be in all these fields at once, in various relations of all sorts, by virtue of the same combination of facts.

Must the predictable conduct of societal agents be constraining action in order that a *legal* relation may exist? Not at all. "Where is the proof of that?" Professor Kocourek asks. There is no "proof" of it, and there can be none. Likewise, it is not possible to furnish "proof" that constraint is necessary to the existence of a legal relation. It is a mere matter of choosing a definition and adopting a usage, not of discovering the invariable elements of an unchangable quantity. But when one asserts that by prevailing usage the term "legal relation" includes Hohfeld's "right, power, privilege, and immunity," or asserts that such usage and definition would be the most convenient and clearly expressive, such assertion is in need of "proof." I make the assertion; but for the present the proof must consist of nothing more than an appeal to experiment and to experience. That a system "continues to prosper" is some evidence.